No. 10-36

IN THE
SUPREME COURT OF THE UNITED STATES

KAPL, INC., LOCKHEED MARTIN CORPORATION, and JOHN J. FREEH, both individually and as an employee of KAPL and Lockheed Martin,

Conditional Cross-Petitioners,

v.

CLIFFORD B. MEACHAM, THEDRICK L. EIGHMIE, ALLEN G. SWEET, JAMES R. QUINN, DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, WILLIAM F. CHABOT, ALLEN E. CROMER, BELINDA GUNDERSON, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PAREENE, MARGARET REYNHEER, JOHN K. STANNARD, DAVID W. TOWNSEND, and CARL T. WOODMAN,

Conditional Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KNOLLS' REPLY BRIEF

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INTRODUCTION

This reply brief is submitted by conditional Cross-Petitioners (hereinafter, "Knolls") in response to the Brief in Opposition ("Opp. Br.") filed by Petitioners, the plaintiffs below (hereinafter, "plaintiffs"), in this important disparate impact age discrimination case.

For the reasons set forth here and in Knolls' conditional cross-petition, if the Court grants the underlying petition, it should also grant Knolls' cross-petition and end this 14-year old litigation on the merits by issuing an order (1) reversing the Summary Order issued by the Court of Appeals to the extent that it ordered a new trial "on the liability issues only," and (2) ordering that judgment be entered in favor of Knolls pursuant to Fed. R. Civ. P. 50(b), based on the existing trial evidence (which was not evenly or closely balanced) on the only substantive question left open after this Court's Opinion in *Meacham v. KAPL, Inc.*, 554 U.S. 84, 128 S.Ct. 2395 (2008) ("*Meacham*")).

This is because the existing trial record makes it clear, and no reasonable jury could find otherwise, that Knolls satisfied its burden of persuasion in response to plaintiffs' disparate impact claims by proving that the layoff factors it used to select plaintiffs for layoff (including "criticality" of skills and the "flexibility" to perform more than one job) were reasonable factors other than age ("RFOA").

ARGUMENT

1. Plaintiffs' RFOA Waiver Arguments Were Considered and Properly Rejected Previously and Should Be Rejected Again

In opposing Knolls' cross-petition, plaintiffs repeat and reargue the very same "waiver" and "abandonment" arguments which they previously made to this Court in *Meacham* (*compare* Pl. Opp. Br., *seriatim*, with Plaintiffs' Initial Supreme Court Brief in *Meacham*, 2008 U.S. S. Ct. Briefs LEXIS 299, at *11-12 (March 4, 2008), and Plaintiffs' Reply Brief, 2008 U.S. S. Ct. Briefs LEXIS 397, at *23 (April 14, 2008)). This fact was correctly observed by the Court of Appeals in support of its conclusion that this Court's Opinion in *Meacham* should be "read . . . as impliedly but necessarily rejecting plaintiffs' waiver argument." (Order, p. 4).

These same waiver arguments were also expressly and properly rejected by the Court of Appeals in "*Meacham II*," 461 F.3d 134, 146 n.9 (2d Cir. 2006) (where the court correctly held, in granting judgment as a matter of law to Knolls on its RFOA defense under both State and federal law, that "defendants [never] waived the argument[] that their business justification was 'reasonable.'"). Plaintiffs' attempts to raise these very same arguments again before this Court in response to Knolls' cross-petition should be rejected outright.

As the Second Circuit correctly noted in its Summary Order, this Court in *Meacham* "was squarely presented with plaintiffs' waiver argument, and a natural reading [of *Meacham*] suggests that it was rejected." (Summary Order, p. 4). Further, it is undisputed that Knolls included an RFOA defense in its answer, specifically asserting, *inter alia*, that "[t]he employment of plaintiffs . . . was terminated . . . for reasonable factors other than their ages within the meaning of the ADEA" (Joint App, p. 124). Thus, despite their protestations to the contrary, plaintiffs were given clear "notice of the [defense] and a chance to argue, if [they could], why the [defense] would be inappropriate," but they never did. *Blonder-Tongue Labs, Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 350 (1971).

Moreover, as demonstrated by the voluminous record already before this Court in *Meacham*, Knolls produced overwhelming and unchallenged RFOA evidence at trial. This evidence was plainly sufficient to put plaintiffs on notice that Knolls' defense was at all times based on proof that plaintiffs were selected for layoff based on job-related, legitimate, and reasonable non-age factors, including specifically their job performance, company service, criticality to the mission of the Laboratory, and flexibility.

2. This Court's Mandate and the Instructive Opinion in *Meacham* May Not Be Ignored

Like the Court of Appeals did below in refusing to grant judgment as a matter of law to Knolls, plaintiffs have improperly ignored the clear mandate and Opinion of this Court in *Meacham*. Similarly, plaintiffs and the court below have improperly ignored the plain language of the RFOA provision added to the ADEA by Congress, as interpreted by this Court in both *Meacham* and *Smith v. City of Jackson*, 544 U.S. 228 (2005).

For example, the Court in *Meacham* held in no uncertain terms that "[t]he focus of the [RFOA] defense is that the factor relied upon was a 'reasonable' one for the employer to be using." *Meacham*, 128 S.Ct. at 2403. The *Meacham* Court also explained clearly, in an Opinion written for the Court by Justice Souter, that "a reasonable factor may lean more heavily on older workers, as against younger ones" (*id.* at 2403), but "that the choice of a practice relying on a 'reasonable' non-age factor is good enough to avoid liability" under the RFOA exception of the ADEA. *Id.* at 2405 (emphasis added again).

Likewise wholly ignored by plaintiffs and in the Second Circuit's Summary Order are this Court's admonitions in *Meacham* to the effect that (1) "Congress took account of the distinctive nature of age discrimination, and the need to preserve a fair

degree of leeway for employment decisions with effects that correlate with age, when it put the RFOA clause in the ADEA, 'significantly narrow[ing] its coverage'" (*id.* at 2406 (quoting *City of Jackson*, 544 U.S. at 233)); (2) the more plainly reasonable the employer's 'factor other than age' is, the shorter the step for that employer from producing evidence raising the defense, to persuading the factfinder that the defense is meritorious" (*id.* at 2406); and (3) the "burden of persuasion answers 'which party loses if the evidence is closely balanced'" and "' [i]n truth, however, very few cases will be in evidentiary equipoise." *Id.* (*quoting Schaffer v. Weast*, 546 U.S. 49, 56 and 58 (2005). Here, a review of the record before this Court in *Meacham* and before the courts below on remand show that the RFOA evidence in this case was neither closely balanced nor in evidentiary equipoise.

In sending this case back to the Court of Appeals for further consideration in light of the Opinion in *Meacham*, this Court did not, as plaintiffs have suggested, merely issue an "open-ended mandate" devoid of any guidance. (Pl. Opp. Br., p. 5). Instead, this Court clarified the nature and focus of the RFOA defense and reaffirmed the RFOA teachings handed down by the Court three years earlier in *City of Jackson*. It was of course in that case that this Court first held that disparate impact claims of age discrimination under the ADEA, while cognizable generally, "are strictly circumscribed by the RFOA exemption" (*id.* at 267 (O'Connor, J.,

concurring) (emphasis added)). And it was in *City of Jackson* where this Court first made it clear that (1) "the scope of disparate-impact liability under the ADEA is narrower than under Title VII" (*Id.* at 240); and (2) that the "business necessity" test and burden-shifting analysis previously applied in the Second Circuit at the time of the trial in the present action do not apply in disparate-impact age discrimination cases under the ADEA.

Undeniably, the Supreme Court's RFOA teachings in both *Meacham* and *City of Jackson* on the "focus" and Congressional purposes behind the RFOA defense – and, perhaps more importantly, on what it means to say, as this Court held in *Meacham*, that employers bear the burden of persuasion on this statutory defense – must be considered in deciding whether or not Knolls satisfied its RFOA burden of persuasion. But the Summary Order ignored all of this Court's teachings and liability-limiting instructions (in both *Meacham* and *City of Jackson*) in deciding that Knolls is not entitled to judgment as a matter of law because "uncertainty and multiple changes in the governing law have complicated the issues in this case." (Order, p. 4). In this respect, the Summary Order fails to carry out and is inconsistent with the mandate and Opinion in *Meacham*, is clearly erroneous, and must be reversed.

In fact, the only question remanded to the Court of Appeals by this Court in *Meacham* was

whether the outcome in *Meacham II*, where this Court correctly observed that the Court of Appeals "showed no hesitation in finding that Knolls prevailed on the RFOA defense" (*Meacham*, 128 S. Ct. at 2406), "should be any different when the burden is properly placed on the employer." That the Court of Appeals failed to carry out and/or misconstrued the mandate and Opinion in *Meacham* seems clear.

Indeed, even the plaintiffs admit in their opposition brief that "the court of appeals did not decide whether defendants had established an RFOA defense on the pre-existing trial record." (Opp. Br., p. 5). Plaintiffs similarly admit, as they must, that the Second Circuit on remand following this Court's Opinion in *Meacham* "refus[ed] to examine the current trial record" (*id.* at 6 n.4), and that "neither the court of appeals nor the district court reached the merits of defendants' RFOA defense." (*Id.*, at 11). Plaintiffs further concede in their opposition brief "that any misconstruction of the mandate [in *Meacham* by the Second Circuit] would warrant correction" by this Court. (Pl. Opp. Br., p. 5). That is the case here.

Accordingly, for all of these reasons, and those set forth in Knolls' cross-petition, this Court should reverse the Second Circuit's new trial order, find that the uncontested and overwhelming record evidence of reasonableness proved at trial by Knolls satisfied its burdens both of production and

persuasion on the RFOA defense, and enter judgment as a matter of law in Knolls' favor on plaintiffs' disparate impact claims, as if on summary judgment, just as the Court did in *City of Jackson*.

3. Granting Judgment for Knolls on the RFOA Defense is Consistent with the Law of this Case and Other Supreme Court Decisions

In opposing Knolls' cross-petition, plaintiffs would have this Court completely ignore not only the full Opinion in *Meacham*, but also certain prior findings made by the Court of Appeals in *Meacham II*. These still-valid findings, all of which are fully supported by the existing record evidence and which this Court never disagreed with in *Meacham*, are still the law of this case.

For example, the Second Circuit in *Meacham II* granted Knolls' motion for judgment as a matter of law based on its finding that although "[t]here may have been other reasonable ways for [Knolls] to achieve its goals . . ., the one selected was not unreasonable." Of course, this is just as it was in *City of Jackson*.

The Court of Appeals in *Meacham II* also found that the proof of reasonableness put on by Knolls at trial established without question or challenge (1) "that the specific features of the IRIF challenged by plaintiffs were routinely-used components of personnel decision-making systems in

general, and were appropriate to the circumstances that provoked KAPL's IRIF." 461 F.3d at 144. In similar fashion, in *Meacham II*, the court also found (based in large part on the unchallenged testimony of Knolls' expert, Frank Landy) that "the criteria 'criticality' ad 'flexibility' were ubiquitous components of 'systems for making personnel decisions,' and that the subjective components of the IRIF were appropriate because the managers conducting the evaluations were knowledgeable about the requisite criteria and familiar with the capabilities of the employees subject to evaluation." *Id.*

As the Second Circuit correctly held in *Meacham II*, this and other evidence of reasonableness introduced at trial by Knolls demonstrated beyond dispute that "KAPL set standards for managers constructing matrices and selecting employees for layoff, and [Knolls] did monitor the implementation of the IRIF," thereby "restrict[ing] arbitrary decision-making by individual mangers." *Id.* at 145. In fact, as the Second Circuit correctly found in *Meacham II*, "KAPL's staffing manager testified to the importance of criticality and flexibility to ensuring that [it] could carry on operations with a shrinking workforce." *Id.* at 144. "This evidence," it was also correctly held, "unquestionably discharged [Knolls'] burden of production" on the RFOA defense. *Id.*

Nothing in this Court's decision in *Meacham* indicates in any way that these findings and holdings by the Second Circuit in *Meacham II* are no longer good law. Accordingly, because these still-valid findings are fully supported by the record evidence, and are consistent with this Court's decisions in *Meacham* and *City of Jackson*, the Second Circuit erred in not granting Knolls' repeated requests for judgment as a matter of law in its favor on the RFOA defense, pursuant to Rule 50(b). *See Reeves v. Sanderson Plumbing*, 530 U.S. 133, 148-49 (2000), *City of Jackson, supra*, and *Ontario v. Quon*, 130 S. Ct. 2619 (June 17, 2010).

Furthermore, even if there was no law of this case, plaintiffs do not genuinely dispute many of the facts set forth in Knolls' cross-petition in support of this continued motion. In fact, plaintiffs have failed to dispute in any material way any of the facts set forth by Knolls with respect to the RFOA evidence introduced at trial (*see* Cross-Pet., pp. 6-11), the jury instructions given by the District Court to the jury (*id.* at 11-15), regarding Knolls' arguments to the jury in summation (*id.* at 1517), regarding Knolls' Rule 50 motions and the assigned Magistrate Judge's denial of Knolls' Rule 50(b) motion on plaintiffs' disparate impact claims (*id.* at 18-21). This is for the simple reason that these facts are fully supported by the record before this Court in *Meacham*, and before the lower courts on remand.

Notably, plaintiffs have also failed to dispute in any way Knolls' position on the exceptional national importance of this case and of the questions implicated by the Second Circuit's Summary Order to both employers and employees alike. (*See id.* at pp. 28-40). Likewise notable is the plaintiffs' failure to oppose or respond in any material way to the arguments made by Knolls at pages 40-43 of their cross-petition. This includes plaintiffs' failure to address or respond to Knolls' arguments in support of their continued motion for judgment as a matter of law based on this Court's decisions in *Reeves v. Sanderson Plumbing*, 530 U.S. 148-49, *City of Jackson, supra*, and *Ontario v. Quo*n, *supra.*

Like the facts in Knolls' cross-petition, each of these cases supports Knolls' position that it should be awarded judgment as a matter of law dismissing plaintiffs' disparate impact claims, as this Court did in *City of Jackson*, based both on plaintiffs' failure to identify a specific facially neutral practice that caused a disparity (contrary to plaintiffs' misrepresentations that they did so), and on indisputable and overwhelming record evidence proving that the layoff factors relied upon by Knolls (including but not limited to criticality and flexibility of skills) were not obscure factors, but were reasonable factors to use in the circumstances of this case, as a matter of law.

The cases cited by plaintiffs in their opposition brief do not compel or warrant a different conclusion.

In fact, a number of these cases discussed below fully support Knolls' position that this Court may grant Knolls' motion for judgment as a matter of law, pursuant to Rule 50(b), rather than countenancing the need for a new trial.

Contrary to plaintiffs' argument to the effect that the Seventh Amendment prohibits this Court from "deciding the sufficiency of the evidence" on appeal in this case (Pl. Opp. Br., p. 12), this Court clearly has the power to enter judgment as a matter of law in favor of Knolls instead of allowing for a new trial as the Second Circuit has now ordered. Indeed, the cases relied upon by plaintiffs for a contrary argument are not only cited out of context, but, when read in their entirety, actually support Knolls' position and request for relief.

Thus, for example, the sole issue in *Cone v. W. Va. Pulp & Paper Co.*, was whether, in the absence of a Rule 50(b) motion for judgment not withstanding the verdict, "an appellate court [has the] power to direct the District Court to enter judgment contrary to the one it had permitted to stand." 330 U.S. 212, 217-18 (1947). In declining to permit entry of judgment, this Court limited its ruling in *Cone* to circumstances in which the moving party failed to timely file a Rule 50(b) motion with the trial court. *Id.* at 218. That is plainly not the case here.

In fact, the record in this case makes it clear that, following the entry of the jury's disparate impact verdict in favor of plaintiffs, Knolls (unlike the defendant in *Cone*) made timely motions under Rule 50(a) and then renewed their motion for judgment as a matter of law under Rule 50(b). Each time, Knolls challenged the sufficiency of plaintiffs' disparate impact evidence, arguing that the plaintiffs failed to establish a *prima facie* case of disparate impact discrimination and that the plaintiffs' layoffs in the reduction in force were justified.

Plaintiffs' reliance on *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935), is also misplaced. In *Redman*, this Court modified the judgment of the Second Circuit, which had held that the trial evidence was insufficient to support the plaintiff's verdict and thus ordered a new trial. In doing so, this Court modified the Court of Appeals' judgment by "substituting a direction for judgment of dismissal on the merits in place of the direction for a new trial." *Id.* at 661.

Simply put, as the Supreme Court made clear in *Redman,* where the sufficiency of the evidence is properly challenged at the trial level, as it was repeatedly here (*see Meacham II*, 461 F.3d at 146 (noting "[d]efendants repeatedly sought judgment as a matter of law with respect to both the ADEA and HRL claims")), this Court has the power to order judgment as a matter of law, instead of a new trial.

CONCLUSION

If the Court grants plaintiffs' underlying petition, Knolls' cross-petition should also be granted, and the Court should grant judgment in favor of Knolls and dismiss plaintiffs' disparate impact claims in their entirety, as a matter of law.

Dated: September 28, 2010

Respectfully submitted,

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